82-1236

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. ____

B.H. MORTON and THOMAS KENT,

Petitioners,

v.

ZIDELL EXPLORATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is a "red letter" cause in a marine repair contract, which exculpates a shipyard from all liability for negligence and which is procured under economic duress, unenforceable under this Court's holding in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1965)?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States District Court for the District of Oregon and in the United States Court of Appeals for the Ninth Circuit are listed in the caption to this proceeding.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported but is to be reported by order of that court dated December 22, 1982, and appears in the Appendix to this petition (1a). The court of appeals' judgment affirms the decision of the United States District Court for the District of Oregon (16a), which is not officially reported.

JURISDICTION

The court of appeals entered its judgment on October 27, 1982. Petitioners did not seek rehearing before the court of appeals. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This appeal involves no significant issues of statutory interpretation or application.

STATEMENT OF THE CASE

Petitioners seek review of a judgment enforcing a "red letter" exculpatory clause in a ship repair contract.

At trial and on appeal, plaintiff-petitioners contended that enforcement of the clause, procured by economic coercion, was barred by this Court's holding in the Bisso trilogy.[1] Notwithstanding these arguments, the court below insulated the defendant shipyard from all liability for causing a fire that nearly destroyed petitioners' fishing vessel.

Bob Morton and Tho Kent are engaged in the marine construction and equipment business in Seattle. Tr. 170-71; 187-90. Morton owns a small used marine equipment business, and Kent works as a marine construction supervisor. In October 1978, as a joint venture, they purchased a 145-foot, steel-hulled tugboat which had been laying idle on the Willamette River near Portland, Oregon, for several years. Tr. 192. They

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[1] Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. S.S. WINDING GULF, 349 U.S. 122 (1955); Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697 (1963).

intended to convert this tug, renamed the BRISTOL MONARCH, into a fish-processing vessel for use in Bristol Bay, Alaska. Tr. 191.

Petitioners delivered the vessel into the custody of Zidell Explorations, Inc. to do the conversion work at its shipyard on the Willamette River in Portland. Zidell is part of a small conglomerate of major businesses engaged in marine repair and construction. Tr. 373.

Petitioners entered into a verbal agreement with Zidell to do the conversion work on a time and materials basis. Tr. 196. Petitioners obtained long-term financing to fund this work, but under the terms of their agreement with the lending institution, this "take-out" loan commitment would expire unless the conversion work was completed by June 10, 1979. Tr. 198, 201. At no time in reaching their oral time-and-materials agreement did the parties discuss, much less bargain over, any provision under which Zidell could be exculpated from liability for negligence in performing the ship conversion.

During the fall of 1978, Zidell began the process of converting the tugboat into a fish-processing vessel. By January 1979, petitioners had paid Zidell $87,000 but owed an additional $195,484 for work which had been completed. Tr. 202. Zidell refused to continue with the conversion work until arrangements were made to eliminate this debt and to insure partial payments as future work progressed. Tr. 200.

In January 1979, petitioners and Zidell discussed entering into a written, fixed-price contract to replace their verbal, time-and-materials agreement. Tr. 203. On January 22, 1979, Thomas Kent gave Zidell a note for $338,000, secured by a preferred ship mortgage on his tug EXPRESS. Tr. 271. This note and mortgage were given to secure Zidell so that the shipyard would resume the conversion work.

On January 25, 1979, petitioners came to Portland to discuss the conversion work with Zidell management. Tr. 203. At this time petitioners were given a written, fixed-price agreement, prepared by Zidell's house counsel,

which contained the critical "red letter" clause. Tr. 323. That clause, which purported to exempt Zidell from liability of any sort, read as follows:

> (1) Pending delivery of the vessel by second party [Zidell] to first party [petitioners] all risks of loss or damage to the vessel shall be upon the first party and all and any insurance affording coverage for perils for which the same may be exposed pending such delivery, procured or provided by the first party, shall inure to the benefit of first party. Second party shall not, under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by first party by reason of loss of, damage to or delays in delivery of, said vessel.

Under the terms of this written contract, Zidell was to complete the conversion for $425,000, $200,000 of which was to be paid upon execution of the agreement. Ex. 3.

Petitioners, who were not represented by counsel, signed this agreement with the expectation that Zidell, secured by the mortgage on the EXPRESS,

would immediately resume the conversion work, even though they could not immediately pay the $200,000. However, Zidell refused to resume work until March 1979, when petitioners obtained interim financing and paid Zidell the $195,484 owing, plus a $50,000 deposit. Tr. 208, 210-11. Zidell resumed the conversion work on a time-and-materials basis, and petitioners, accordingly, paid Zidell as work was completed, not on the fixed-price basis specified in the written contract. Tr. 215-16.

On May 2, 1979, while the BRISTOL MONARCH was lying at the Zidell dock, a Zidell employee welding on one of her bulkheads ignited combustible material on the opposite side of the bulkhead, causing a fire which nearly destroyed the vessel. Tr. 258, 267.

Zidell's employees admitted that no fire watch had been maintained on the night of the fire. Tr. 164-65; 315-16. This was a violation of Portland's fire and harbor codes. Exs. 21, 22. In addition, fire department officials testified that Zidell's firefighting equipment was inadequate. Zidell's hoses on

the docks had no nozzles on them, and the hose threads were incompatible with the fire department's national standard nozzles. The one hydrant on the premises was blocked by scrap or debris and was inaccessable to the fire department. Tr. 256-57; 262-63.

Petitioners subsequently filed an action in negligence seeking damages of $284,000 to the vessel and other personal property resulting from the fire, and additional damages of $1,200,000 for loss of the use of the vessel in the Alaska fishing season immediately following the intended completion of the conversion work. The jury, answering special interrogatories, found that Zidell's negligence was 96 percent responsible for the fire.[2] The jury further found, however, that under the

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[2] The jury's finding attributing 4 percent contributory negligence to petitioners was apparently based on testimony by a Zidell foreperson that petitioners had locked the door giving access to the interior side of the bulkhead upon which Zidell's employee was welding. Tr. 309-10.

terms of the written contract between the parties, specifically the "red letter" clause, defendant was exculpated from all liability.

Petitioners, who first contested the exculpatory clause's validity in their pretrial submissions, subsequently moved for a judgment N.O.V. on the grounds that the "red letter" clause was unenforceable under this Court's holding in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). CR. 32. Specifically, petitioners argued that the clause should not be enforced because enforcement would encourage and sanction systematic negligence, including violations of municipal fire and safety codes, and because the clause was the product of the sort of economic overreaching condemnned in Bisso. The district court, the honorable Edward Leavy, United States Magistrate, rejected these contentions, finding that "there has been no evidence that the policy considerations of Bisso apply to shipyards," and that plaintiffs had shown no economic overreaching or coercion. (21a)

The court of appeals, while recognizing a split between the First and Fifth circuits in applying Bisso to ship storage and repair contracts, affirmed on the basis of Hall-Scott Motor Car Co. v. Universal Insurance Co., 1.2 F.2d 531 (9th Cir.) cert. denied, 314 U.S. 690 (1941), a pre-Bisso holding. The court held that Bisso merely reaffirmed a long line of towage cases predating Hall-Scott, which were distinguished in Hall-Scott, and, accordingly, Bisso did not overrule Hall-Scott sub silentio. (10a). The court of appeals also affirmed the district court's finding that the "red letter" clause was not the product of economic overreaching as not clearly erroneous. Finally, the court emphasized that its holding was "narrow" and that it did not "purport to circumscribe Bisso's continued application to towage cases." (11a)[3]

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[3] The court of appeals' "narrow" language is ambiguous. It is unclear whether the court was stating that its holding did not limit Bisso's application to towage cases only, or that the

REASONS FOR GRANTING THE WRIT

The judgment of the court of appeals is in direct conflict with this Court's holdings in the Bisso trilogy. The courts below ignored the negligence deterrence policies underlying Bisso. Indeed, neither the district court nor the Ninth Circuit addressed petitioners' principal argument that enforcement of the "red letter" clause would encourage and sanction negligence. Enforcement of the exculpatory clause also runs afoul of Bisso's second "overreaching" rationale where, as here, the insulating provision was procured through economic coercion.

The Ninth Circuit's holding conflicts with First Circuit authority, applying Bisso to ship storage exculpatory provisions. See Fireman's Fund

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3 (cont'd) holding did not circumscribe Bisso's application in towage cases. Under the latter reading, the court would be characterizing Bisso as a jurisprudential aberration whose policies and principles could not be transferred to any other context.

American Ins. Co. v. Boston Harbor Marina, Inc., 406 F.2d 917 (1st Cir. 1969); Fireman's Fund American Ins. Co. v. Capt. Fowler's Marina, Inc., 346 F. Supp. 347 (D. Mass. 1971). Courts of appeal in the Fifth and, by incorporation, the Eleventh circuits have enforced "red letter" clauses in ship repair contracts. Todd Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401 (5th Cir. 1982); Alcoa Steamship Co. v. Charles Ferran and Co., 383 F.2d 46 (5th Cir. 1967), cert. denied, 393 U.S. 836 (1968). In each instance, however, the contract limited the shipyard's potential liability to a certain amount, rather than exempting the shipyard from all liability for negligence. This Court should accept review to resolve these conflicts on an important question of admiralty law.

I

THE DECISIONS BELOW ARE IN DIRECT CONFLICT WITH THIS COURT'S HOLDINGS IN THE BISSO TRILOGY.

This Court in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955),

defined the standards against which exculpatory provisions in non-pilotage maritime contracts must be tested.[4] The Court held a provision of a towage contract that placed the "sole risk" of the towage on the shipper invalid as a matter of law. This result represented "merely a particular application to the towage business of a general rule long used by the courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers." 349 U.S. at 9 (footnotes omitted).

Two policies supported this "general rule:"

> (1) To discourage negligence by making wrongdoers pay the damages, and

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[4] Special policies permit exculpation in the pilotage context. Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 91 (1932). As discussed at pages 18-19, infra, the ship conversion work in the present case was more closely analogous to Bisso towage than to Sun Oil pilotage.

> (2) To protect those in need of goods o· services from being overreached by others who have the power to drive hard bargains.

349 U.S. at 91. Justice Douglas expanded on these policies in a cogent concurrence:

> It ought to be against public policy to allow a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness, and neglect . . . [T]he design is to prevent those who have absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it.

349 U.S. at 97, quoting THE OCEANICA, 170 F. 893, 896 (2d Cir. 1909) (Coxe, J., dissenting.) This analysis was reiterated without qualification in Boston Metals Co. v. S.S. WINDING GULF, 349 U.S. 122 (1955), and Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697 (1963).

Both Bisso policies are implicated in the present case. Both were compromised in the decisions below. Because the "red letter" clause insulated Zidell

from all liability "under any circumstances whatsoever," the contract eliminated deterrence of such socially undesirable conduct as violations of fire and safety codes. Moreover, the exculpatory provision was not the product of arm's-length bargaining between the parties but of precisely the sort of overreaching that Bisso refused to sanction. Zidell did not even suggest a "red letter" clause at the time of the initial repair contract, when petitioners were free to refuse and to go elsewhere. Rather, Zidell imposed exculpatory language after repairs began, when petitioners were indebted, attempting to secure financing, and unable to move the BRISTOL MONARCH due to Zidell's lien claims against the vessel--when any offer Zidell made was an offer petitioners could not refuse.

The court of appeals ignored Bisso's negligence deterrence reasoning. Its holding on the enforceability of the "red letter" clause was based almost exclusively on Hall-Scott Motor Car Co. v. Universal Insurance Co., 122 F.2d 531 (9th Cir.) cert. denied, 314 U.S. 690

(1941), a pre-Bisso decision which made no reference to negligence deterrence. Notwithstanding the Ninth Circuit's silence, the record is an indictment of Zidell's conduct and a vindication of Bisso's negligence deterrence policy. Zidell, liberated from liability, acted in systematic disregard of fire and safety codes.

It is undisputed that Zidell's negligence caused the fire aboard the BRISTOL MONARCH. But this was not a momentary bit of carelessness.

Zidell failed to maintain a fire watch as required by Portland's city fire code and harbor code. Zidell failed to instruct its employees concerning fire regulations and safety procedures. It failed to supervise properly welding operations onboard ship, failed to inspect the ship before welding, and failed to remove flammable material from the inside of the bulkhead before welding on its exterior. After the fire started, Zidell's firefighting equipment was completely inadequate. The hoses along the docks did not have nozzles on them, nor were the hose

threads compatible with the fire department's national standard threads. The one hydrant on the premises was blocked by scrap or debris and was inaccessible to the fire department. In short, Zidell could not have acted in more total disregard of relevant safety standards and procedures had it consciously set out to do so.

The circumstances militating against exculpation of negligence in this case are more closely analogous to those in the towage context than to those in pilotage, where the Court has permitted exculpation. Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932). In Bisso, Justice Black carefully distinguished Sun Oil:

> A pilotage clause exempts for the negligence of pilots only; a towage clause exempts from all negligence of all towage employees. Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal government. Some state law make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible

> with the general obligations of obedience normally owed by an employee to his employer . . . . As a rule no employer, no person, can tell them how to perform their pilotage duties. When the law does not prescribe their duties, pilots are usually free to act on their own best judgment while engaged in piloting a vessel. Because of these differences between pilots and towage employees generally, contracts stipulating against a pilot's negligence cannot be likened to contracts stipulating against towers' negligence. It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel on that vessel's own power. That was the Sun Oil case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employees' negligent towage of a vessel.

349 U.S. at 93-94 (footnotes omitted).

In this case, the defendant shipyard was not subject to strict regulation and licensing which minimized the potential for negligence and rendered further deterrence nugatory. Nor were

the Zidell employees, whose negligence caused the fire, independent actors whose negligence could not be attributed to, nor effectively controlled by, their employer. They were, rather, closely akin to the tug crew-employees in Bisso. In a related sense, Zidell acted more as the tug of a "dead tow" than the pilot of a "live ship" operating under its own power. Zidell functioned much as a bailee. It controlled the BRISTOL MONARCH; the impetus for the vessel's destruction was exclusively Zidell's.

Nonenforcement of the "red letter" clause, consistent with Bisso, would promote optimal deterrence of negligence by placing the costs of accidents on Zidell, "the party best situated to adopt preventative measures and thereby to reduce the likelihood of injury." Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964). Zidell was in a superior position to compare accident costs and avoidance costs. See G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); Calabresi, "Optimal Deterrence and Accidents: To Fleming James, Jr.,"

84 Yale L.J. 656 (1975). With its vast history of ship repairs and its familiarity with its own facilities and operations, Zidell could assess the risks of accidents and the costs of various preventative measures with far more precision and sophistication than petitioners, who had little experience with ship repairs.

Zidell's business is ship repair and conversion. It has far greater knowledge of fire safety regulations and practices than the shipowners with whom it contracts. With such knowledge comes commensurate appreciation of the costs of care and the risks of neglect. And Zidell wields and controls the implements of fire. Zidell can weigh the consequences of particular practices much more accurately than can ship owners.

As the better cost avoider, the burden of accident avoidance should fall on Zidell. It must not be permitted--and, under Bisso, is not permitted--to shift this burden, to act without the

limits of liability, through a "red letter" clause.

The court of appeals, forsaking consideration of negligence deterrence, based its holdings solely on Bisso's economic overreaching rationale. Specifically, the Ninth Circuit affirmed the district court's finding that because Zidell was not "the only game in town," the exculpatory language could not have been the product of economic coercion. This analysis misconstrues this Court's holdings, for it presumes that an exculpated defendant must enjoy a virtual monopoly before Bisso's "overreaching" policy is triggered.

Nothing in the Bisso trilogy characterizes the existence of a monopoly as the sine qua non for nonenforcement of an exculpatory clause. Rather, the Court in Bisso, while recognizing "monopolistic compulsions," identified negligence deterrence and protection against overreaching by those "who have the power to drive hard bargains," as independent policies, the "two main reasons" for nonenforcement of exculpatory provisions. 349 U.S. at 91. Either of these

policies alone, or some sliding-scale combination of the two, can compel non-enforcement of a "red letter" clause.

This reading of Bisso was confirmed in Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963). In Crescent Towing & Salvage Co. v. Dixilyn Drilling Corp., 303 F.2d 237 (1962), the Fifth Circuit, finding no evidence of overreaching, emphasized that "Crescent had competition on movements of this kind from three harbor towing companies in New Orleans and from others in Mobile and in the Galveston-Houston area." 303 F.2d at 246. This Court, reversing the court of appeals' affirmance of the exculpatory clause, neither disputed nor rejected this essential finding.

Zidell did not enjoy a monopoly of ship repair or conversion in the Portland area. But it was a functional monopolist vis-a-vis petitioners at the time it extracted the "red letter" clause. Petitioners' only choice was submission. That is the essence of Bisso overreaching.

Zidell imposed the exculpatory clause not at the time the parties freely entered into their initial oral time-and-materials agreement, but in January 1979, three months later, after construction had begun. In January, petitioners owed Zidell $196,000 and had been unable to secure interim financing. Petitioners' long-term financier had set a June commitment deadline for completing conversion. Petitioners could not take the vessel to a different shipyard because Zidell would have enforced maritime and possessory liens and would not have released the vessel without payment. Zidell gave petitioners the choice of accepting the contract, including the exculpatory clause, or losing their investment in the vessel itself.

The court of appeals concluded that petitioners were not overreached because, if they felt victimized by the exculpatory clause, they could have taken the vessel elsewhere in March, when they paid their outstanding balance. (10a-11a). This is incorrect. Had petitioners removed the partially converted ship

in March, they would have been subject to suit for breach of the parties' written fixed-price conversion contract, with consequential damages, including lost profits.

Again, it must be emphasized, consistent with Bisso's "hard bargaining" concern, that Zidell did not bargain for an exculpatory clause initially, at the time petitioners were free to go elsewhere. It was doubtless because of this freedom that Zidell did not even mention any sort of "red letter" clause in October 1978. Only after substantial work had been completed and petitioners were unable to move the BRISTOL MONARCH --only when Zidell was "the only game in town" open to petitioners--did Zidell impose its terms.

The court of appeals also suggested that petitioners, by failing to meet payment schedules, had placed themselves at an economic disadvantage and are in no position to complain. This misses the mark, for there was no connection between Zidell's insecurity and its imposition of the "red letter" clause.

Creditors can require additional security because of changing circumstances over the terms of a contract; Zidell's demands for payment and for a preferred ship mortgage on the tug EXPRESS were acceptable responses to concerns about petitioners' financial condition. But the imposition of the "red letter" clause was extraneous to these concerns.

The court of appeals misconstrued Bisso's "overreaching" policy and did not address its negligence deterrence policy. Because its decision contradicted holdings of this Court, the writ should issue.

II
THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER

The Ninth Circuit's holding, based on its pre-Bisso decision in Hall-Scott Motor Car Co. v. Universal Insurance Co., supra, conflicts with First Circuit authority applying Bisso to ship storage contracts. See Fireman's Fund American Ins. Co. v. Boston Harbor Marine, Inc., 406 F.2d 917 (1st Cir. 1969); Fireman's Fund American Ins. Co. v. Captain

Fowler's Marina, Inc., 346 F. Supp. 347 (D. Mass. 1971). The Fifth Circuit has enforced provisions limiting shipyards' liability, rather than exempting them from all liability or negligence. See Todd Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401 (5th Cir. 1982); Alcoa Steamship Co. v. Charles Ferran & Co., 383 F.2d 486 (5th Cir. 1967), cert. denied, 393 U.S. 836 (1968). The Eleventh Circuit, by incorporation, also subscribes to this approach.

In Fireman's Fund American Ins. Co. v. Boston Harbor Marina, Inc., supra, the court sua sponte analyzed Bisso's application to a ship storage contract insulating the storage facility from liability for fire losses caused by its negligence. The court held that Bisso did govern the contract's validity but remanded for development of a fuller record on negligence deterrence and relative bargaining power issues. 406 F.2d at 920-21. Accord, Fireman's Fund American Ins. Co. v. Captain Fowler's Marina, Inc., supra (plaintiff's yacht destroyed under circumstances closely analogous to those presented here;

exculpatory clause in storage contract invalid under both Massachusetts bailment law and Bisso admiralty principles).

The Fifth Circuit has never explicitly considered the validity of a "red letter" clause exempting a shipyard from all liability for negligence. It has, however, twice enforced contractual limitations of liability in ship repair contracts. In Alcoa Steamship Co. v. Charles Ferran and Co., supra, the court found a clause that limited the defendant shipyard's liability to the first $300,000 in damages valid under Bisso. "Potential liability for $300,000 should deter negligence." 383 F.2d at 55. Similarly, in Todd Shipyards Corp. v. Turbine Service, Inc., supra, the court enforced another $300,000 limitation of liability provision. 674 F.2d at 410-11. Cf. Canarctic Shipping Co. v. Great Lakes Towing Co., 670 F.2d 61, 63 (6th Cir. 1982) (distinguishing exemption "immunizing" defendant in towage context, from limitation of liability "which does not induce or encourage negligence"). The Eleventh Circuit,

through its adoption of Fifth Circuit law, adheres to these holdings.

Four courts of appeals have split on the implications of Bisso, a significant and recurrent issue in admiralty law. The Court must grant this petition to resolve these conflicts.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

B. H. MORTON and THOMAS KENT,	)	No. 81-3194
Plaintiff-Appellants,	)	D.C. No. 79-1199
v.	)	OPINION
ZIDELL EXPLORATIONS, INC.	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
District of Oregon
Edward Leavy,
United States Magistrate, Presiding

Before: SNEED and SKOPIL, Circuit Judges, and COUGHENOUR,* District Judge

PER CURIAM: Morton and Kent ("appellants"), owners of a tugboat, contracted with Zidell Explorations,

*The Honorable John C. Coughenour, United States District Judge for the Western District of Washington, sitting by designation.

Inc. ("Zidell"), a shipyard, to convert their tug into a fish-processing vessel. During the course of the conversion the ship was almost completely destroyed by fire. Appellants sued for negligence, judgment was entered for Zidell, and Morton and Kent appealed. Two questions are presented here. First, is an exculpatory clause in a marine repair contract enforceable under the Supreme Court's decision in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)? We conclude that it is. Absent evidence of overreaching, exculpatory clauses in ship repair contracts are enforceable in this Circuit. Hall-Scott Motor Car Co. v. Universal Insurance Co., 122 F.2d 531 (9th Cir.), cert. denied, 314 U.S. 690 (1941). Second, did the trial court err in allowing Zidell to introduce evidence that appellants' vessel was insured at the time of the fire? We conclude that it did not. We affirm.

I. FACTS AND PROCEEDINGS BELOW

Appellants purchased an old tugboat and orally contracted with Zidell, a marine repair and construction company,

to convert it into a fish freezer-processor for use in the Bristol Bay fishery. The conversion work began in the fall of 1978. By January 1979 appellants owed Zidell approximately $200,000 for work performed. Zidell refused to continue with the work until arrangements were made to eliminate this debt and to ensure partial payments as future work progressed. To that end the parties, on January 25, 1979, executed a written fixed-price contract to govern the balance of the conversion. The agreement, drafted by Zidell's attorney, contained a "red-letter" clause exculpating Zidell from "all risks of loss or damage . . . under any circumstances whatsoever."

The jury found that the written contract between the parties was in effect on May 2, 1979, the date of the fire. There was evidence presented at trial from which the jury could conclude that the "red-letter" clause was placed in the first paragraph of the contract to assure its prominence, that appellants were knowledgeable businessmen, and that they read and signed the

agreement without expressing any reservations.

Appellants did not secure interim financing and satisfy their $200,000 indebtedness to Zidell until early March 1979. Under the contract, Zidell was not obligated to proceed with the conversion until such payment was made and, in fact, Zidell stopped work on the boat until appellants brought the account current in March, whereafter work resumed.

In January 1979 appellants purchased a builders' risk insurance policy on the vessel. Although it was undisputed that the policy became effective on January 26, 1972, the day after the execution of the contract for the vessel's conversion, there was conflicting evidence presented on appellants' motives for acquiring the insurance, and on when appellants first sought to obtain the policy.

On May 2, 1979, while appellants' vessel was lying at the Zidell dock, a Zidell employee welding on one of her bulkheads ignited combustible material on the opposite side of the bulkhead,

causing a fire which nearly destroyed the vessel. Appellants sued Zidell for negligence, alleging damages of approximately $300,000 to the vessel and other personal property, plus additional damages of $1,200,000 for loss of use of the vessel in the Alaska fishing season immediately following.

The parties stipulated to a bifurcated trial before United States Magistrate Edward Leavy, with the liability issues tried first to a jury. In answers to special interrogatories the jury found that Zidell's negligence was 96 percent responsible for the fire, and that appellants' negligence accounted for the balance. The jury also answered a special interrogatory concerning the efficacy of the January 25th contract, and found the agreement to have been effect at the time of the May 2nd fire. Appellants moved for a judgment notwithstanding the verdict on the grounds that the "red-letter" clause was unenforceable as against public policy, and that the clause could not exculpate Zidell from its own negligence because it did not specifically refer to negligence or

tort liability. Appellants did not renew the latter argument on appeal.

Magistrate Leavy, applying federal admiralty law, denied the motion for judgment n.o.v. In so doing he found expressly that the appellants were not the victims of overreaching or unequal bargaining power. He further found that no evidence had been adduced from which it could be concluded that Zidell wielded any monopoly power in the shipyard business, nor which would allow the conclusion that appellants could not have had the subject repairs performed elsewhere. Accordingly, appellants' motion was denied and judgment entered for Zidell. Morton and Kent appeal from that judgment.

II. THE "RED-LETTER" CLAUSE

The Supreme Court has held a "red-letter" clause in a tugboat towing contract to be void as against public policy. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. The S/S Winding Gulf, 349 U.S. 122 (1955); Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697 (1963).[3] In Bisso, Inland

Waterways contracted to tow Bisso's oil barge up the Mississippi. The barge collided with a bridge pier and sank. Bisso sued, alleging negligent towing. Inland sought to avoid liability, in part, by invoking a provision in the towage contract which provided that Bisso assumed "sole risk" of the towage. The Supreme Court, appling federal admiralty law, invalidated the clause. Mr. Justice Black, writing for the Court, stated the reasons for the invalidation: "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." 349 U.S. at 91. This Court has applied such a rule in the context of towage contracts. D. R. Kincaid, Ltd. v. Trans-Pacific Towing, Inc., 367 F.2d 857, 858-59 (9th Cir. 1966).

In their arguments both here and below the parties hotly dispute the applicability of Bisso and its progeny to shipyard repair cases. Appellants rely on First Circuit authority which

invokes Bisso principles in invalidaing "red-letter" clauses, while appellees seek support from Fifth Circuit decisions which uphold exculpatory clauses in the absence of evidence of overreaching. In declining to invalidate the "red-letter" clause in the contract at issue here, the trial court, finding no evidence of overreaching, followed the Fifth Circuit.

This Circuit has addressed and resolved this question. In Hall-Scott Motor Car Co. v. Universal Insurance Co., 122 F.2d 531 (9th Cir.), cert. denied, 314 U.S. 690 (1941), the Court framed the issue as follows: "Can the parties to a maritime contract to repair a vessel validly stipulate that the repairer may be freed from the consequences of his negligent damage to the vessel in his custody for repairs?" 122 F.2d at 534. The Court concluded that they could. The relevant facts of that case are essentially identical to those before the Court here. The owner of a pleasure boat had delivered it to Hall-Scott for the installation of a new engine, under a contract which provided

in part that "Hall Scott will not be held responsible for any damage to [the vessel] . . . while the engine installation is being made." 122 F.2d at 533. During the course of the conversion the boat was virtually destroyed by fire. The owner's insurer paid him and sued Hall-Scott for, inter alia, negligence. This Court, applying federal admiralty law, reversed a judgment for the insurer and ordered judgment for Hall-Scott on the basis of the "red-letter" clause. It held that a clause which exculpates a party to a contract from his own negligence is valid if not contrary to public policy.

Although Hall-Scott predates Bisso, it is still good law in this Circuit. Bisso merely reaffirmed the rule applicable to tugboat towing established in The Steamer Syracuse, 79 U.S. (12 Wall.) 167 (1870), and Compania de Navegacion, Interior, S.A. v. Fireman's Fund Ins. Co., 277 U.S. 66 (1928). 349 U.S. at 90. The Bisso Court also distinguished Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932), which had upheld a clause exculpating tugboat owners from

liability for negligent pilotage by an employee. 349 U.S. at 92-94. The Hall-Scott decision carefully considered those three earlier cases in concluding that public policy did not require the invalidation of that "red-letter" clause. 122 F.2d at 536-37. Bisso merely reaffirmed the rule for towage contracts. It did not overrule Hall-Scott sub silentio.

Although contract clauses which result from overreaching will not be enforced, the trial court concluded that appellants had not been overreached. Such a finding will not be disturbed unless clearly erroneous. See Anaconda Building Materials Co. v. Newland, 336 F.2d 625, 628 (9th Cir. 1964). Appellants argue that because their long-term financier insisted that the conversion be completed by June, and because Zidell would not release the vessel until appellants' $200,000 indebtedness was satisfied, they had no choice but to sign the written agreement. However, the evidence indicates that in signing the contract appellants neither objected to nor

mentioned the "red-letter" clause. Moreover, any economic pressure to sign the contract was the product of appellants' own failure to maintain the payment schedule established by the original agreement. Finally, had appellants in fact felt victimized by the terms of the January contract there was nothing to prevent them from taking their vessel to another yard in March, when they brought their account current. Accordingly, we affirm the trial court's finding that appellants were not overreached. On these facts it is beyond the province of this Court to imply limitations or conditions on the exercise of a power to allocate risks so unmistakably expressed. We therefore reaffirm our ruling in Hall-Scott and hold that absent evidence of overreaching, "red-letter" clauses in ship repair contracts will be enforced. In arriving at this result we emphasize that our holding is a narrow one; in so ruling we do not purport to circumscribe Bisso's continued application to towage cases.

III. THE INSURANCE ISSUE

At trial the Magistrate permitted Zidell to elicit evidence that appellants had obtained builders' risk insurance on their vessel sometime prior to the fire. He did so over appellants' objection that any probative value which the evidence might have had was substantially outweighed by its potential for prejudice. The trial court allowed appellants a continuing objection, and cautioned the jury to limit its consideration of the insurance evidence to the issue of whether there existed a binding contract between the parties.

Appellants took the position at trial that there was never a mutually agreed-upon written contract between the parties and, if there was, that Morton and Kent, upon leaving the office in which the agreement was signed, did not believe it to be binding. To refute these contentions Zidell adduced evidence that the principal agreement required appellants to obtain builders' risk insurance to diffuse the risk which the contract imposed on them, that the terms of the agreement signed on January

25th had essentially been agreed upon sometime prior to that date, and implied that it was more than a mere coincidence that the effective date of the insurance policy was the day after the contract's execution.

We conclude that the Magistrate ruled properly in finding the evidence relevant and probative. Evidence of liability coverage is admissible if offered for relevant purposes, Fed. R. Evid. 411. Here the jury was entitled to consider evidence relevant to the existence and binding effect of the contract. Any prejudice to appellants was outweighed by the probative value of the evidence, and was minimized by the Court's cautionary instruction. We conclude that the appellee was properly allowed to introduce evidence of appellants' risk coverage for the limited purpose of proving that appellants deemed themselves bound by the contract.

AFFIRMED.

060/F

FOOTNOTES

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1. The exculpatory clause is contained in the first paragraph of the agreement. It reads, in its entirely:

> "1. Pending delivery of the Vessel by Second Party [Zidell] to First Party [Morton-Kent], all risk of loss of or damage to the Vessel shall be upon First Party [Morton-Kent], and all and any insurance affording coverage for perils to which the same may be exposed pending such delivery, procured or provided by First Party [Morton-Kent], shall inure to the benefit of First Party [Morton-Kent]. Second Party [Zidell] shall not, under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by First Party [Morton-Kent] by reason of the loss of, damage to, or delays in delivery of, said Vessel."

2. The contract contained a choice-of-law clause which provided that Oregon law would govern, "subject to the jurisdiction of the Courts of the United States as to matters purely maritime in nature." The Magistrate applied federal admiralty law, and the parties do not challenge that application. We note in

passing that it has long been held that ship repair or conversion contracts are governed by federal maritime law. See, e.g., New Bedford Drydock Co. v. Purdy, 258 U.S. 96 (1922).

3. Boston Metals and Dixilyn Drilling merely reaffirmed and applied Bisso.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

B. H. MORTON and THOMAS KENT,	)	Civil No. 79-1199
Plaintiff,	)	
v.	)	OPINION
ZIDELL EXPLORATIONS, INC.	)	
Defendant.	)	

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LEAVY, Magistrate

Plaintiffs move for judgment NOV after the return of a special verdict by the jury. The parties have stipulated to proceedings before a United States Magistrate.

Plaintiffs filed this action seeking damages stemming from the burning of their boat while it was being worked on at defendant's shipyard. The jury found that the negligence of defendant was ninety six percent responsible for the fire and the plaintiffs' negligence was four percent responsible. The jury also found that a written contract containing an exculpatory clause was in effect at the time. The issue raised by this motion for judgment NOV is the legal effect of this exculpatory clause which purports to relieve defendant of liability. Defendant argues that the clause protects it from any liability for negligence in this action, and plaintiffs naturally contest this. The clause reads as follows:

> 1. Pending delivery of the Vessel by Second Party to First Party, all risk of loss or damage to the Vessel shall be upon First Party, and all and any insurance affording coverage for perils to which the same may be exposed pending such delivery, procured or provided by first party, shall inure to the benefit of First Party. Second Party shall not

> under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by First Party by reason of the loss of, damage to, or delays in delivery of said Vessel.

Plaintiffs argue first that the clause is invalid as a matter of public policy and second, assuming it is not against public policy, it is ambiguous and unenforceable because it does not specifically refer to liability for negligence or tort.

If the case involved a towing contract, the clause would most likely be invalid as against public policy under federal law. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. Winding Gulf, 349 U.S. 122 (1955); Dixilyn Drilling Corp. v. Crescent Towing and Salvage, 372 U.S. 697 (1963). And although the contract contains a clause directing that Oregon law should be applied, such clauses cannot be used to defeat a principle of federal public polcy such as that stated in Bisso. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

However, this contract involves a shipyard. It is not clear that the Bisso policy extends to shipyards. The Court in Bisso held that exculpatory clauses in towing contracts were against public policy because they encouraged negligence and because tow operators were often in a position to exact such clauses due to their favorable bargaining position. While the opinion did refer to bailees as among the special group for whom such clauses would not be enforced, it did not discuss the issue in any significant manner, nor was the issue before the Court. The circuits have differed in their response to Bisso insofar as shipyards are concerned.

The First Circuit left the issue open in Firemen's Fund American Ins. Co. v. Boston Harbor Marina, Inc., 406 F.2d 917 (1st Cir. 1969). Later, a district court ir the First Circuit refused to enforce a shipyard's "red letter" clause saying "Federal law also disregards liability limiting provisions in bailment agreements [Citing Bisso]." Fireman's Fund American Ins. Co. v.

Captain Fowler's Marina, Inc., 343 F. Supp. 347 (D. Mass. 1979).

The other circuit whose decisions have been cited is the Fifth Circuit. The approach there has been to enforce the clauses if there is no evidence of overreaching. In Alcoa Steamship Co. v. Charles Ferran and Co., 383 F.2d 46 (5th Cir. 1967), the Court enforced a limitation of liability of $300,000. The Court reasoned that liability for $300,000 would deter negligence and that plaintiff's bargaining position was not inferior to defendant's. While the case is distinguishable from this action on the basis of the $300,000 limitation, the opinion gives the strong impression that the result would have been no different, especially where it states that plaintiff's bargaining position was not inferior. In Bisso, the Supreme Court never addressed the individual bargaining position of the parties and made its decision on the basis of general public policy. The Fifth Circuit was therefore clearly not extending Bisso to shipyards. The court in Hudson Waterways Corp. v. Coastal

Marine Services, Inc., 436 F. Supp. 597 (E.D. Texas 1977) also enforced an exculpatory clause. It found that the policy considerations present in Bisso were not present. It also examined the individual transaction for fairness and was impressed by the fact that plaintiff and defendant had been doing business for over twenty years and that this was the first instance of negligence by defendant. The other case cited by plaintiff is Todd Shipyards Corp. v. Turbine Service Inc., 467 F. Supp. 1257 (E.D. La. 1978). There the court, after citing the above cases from the Fifth Circuit, refused to enforce an exculpatory clause on the grounds that defendant was not only negligent, but was grossly negligent. The jury in the case at bar was not asked to consider the issue of gross negligence and the court cannot now indulge in additional fact-finding. Plaintiffs are therefore not entitled to the benefit of Todd.

I find the approach of the Fifth Circuit more persuasive. There has been no evidence that the policy considerations of Bisso apply to shipyards. In

particular, there has been no showing that shipyards tend to have a monopolistic hold on the market or that a shipowner is severely restricted in choosing a shipyard. I find that Bisso does not extend to shipyards and that the exculpatory clause is not void as against public policy absent some showing of overreaching or unequal bargaining power.

Plaintiffs are not convincing in arguing that they were in an inferior bargaining position. Again there is no evidence the defendant had a monopoly or that plaintiffs could not have had the repairs to their boat done elsewhere. After repairs had been commenced, and monies became payable, plaintiffs cannot complain that defendant would not release its lien without payment. The written contract here at issue was apparently entered into after payment problems arose, and it allowed defendants to continue work. This is what the parties bargained for at that time. I find that plaintiffs were not the victims of overreaching.

The issue is then whether the clause unambiguously states that defendants are being relieved of liability for negligence. The principal language states that defendants will not be liable for loss "under any circumstances whatsoever." I find that this language is sufficiently clear to drive home to the plaintiffs that defendant was not to be liable even for its own negligence. Negligence is not so unusual or remarkable that it is not within the reasonable scope of the words "any circumstances whatsoever."

Plaintiffs argue that the clause is ambiguous because it does not specifically refer to torts such as negligence and does not contain any tort terminology. However, no case is cited where a clause was invalidated solely for failure to contain such terminology even though it otherwise satisfactorily gave notice of its exculpatory nature. In the airline context, the Ninth Circuit held that a clause was not invalid for failure to contain tort words (although it was invalid as against public policy). Northwest Airlines Inc. v. Alaska

Airlines, Inc., 351 F.2d 253 (9th Cir. 1965). The Ninth Circuit did approve a clause in Marr Enterprises Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 956 (9th Cir. 1977) on the grounds that the clause specifically referred to negligence. However, it was not stated that the clause would have been disapproved even if it had been clear in its import, but did not have the tort words. I conclude that such magical tort words are not required where an exculpatory clause, such as the instant one, is otherwise clear about its intended effect. To the extent that its law is persuasive, Oregon would uphold this exculpatory clause. In Atlas Mutual Ins. v. Moore Dry Kiln, 38 Or. App. 111 (1979), the Oregon Court of Appeals upheld a clause which exempted defendant from liability from loss resulting from "any cause." See: K-Lines v. Roberts Motor Co., 273 Or. 242 (1975). I find that the above clause is enforceable and was effective to exempt defendant from liability for negligence such as was found in this action.

CONCLUSION

IT IS ORDERED that plaintiffs' motion for judgment NOV is denied.

82-1236

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82-1236

B. H. MORTON and THOMAS KENT, Petitioners,

v.

ZIDELL EXPLORATIONS, INC., Respondent.

BRIEF OF RESPONDENT ZIDELL EXPLORATIONS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. _____

B. H. MORTON and THOMAS KENT, Petitioners,

v.

ZIDELL EXPLORATIONS, INC., Respondent.

BRIEF OF RESPONDENT ZIDELL EXPLORATIONS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Zidell Explorations, Inc., defendant below, urges the court to deny the petition of B. H. Morton and Thomas Kent for certiorari.

QUESTIONS PRESENTED FOR REVIEW

Respondent Zidell Explorations, Inc. does not agree with petitioner's statement of the question presented for review. The question is more accurately stated as follows:

Is a "red letter" clause in a marine repair contract enforceable under this

court's holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629, 99 L.Ed. 11 (1955), where the parties work concurrently on the vessel and are concurrently negligent in causing a fire which damages the vessel?

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STATEMENT OF THE CASE

Petitioners B. H. Morton and Thomas Kent (hereinafter "petitioners" or "owners") seek review of a judgment enforcing a "red letter" exculpatory clause in a ship repair contract entered into between petitioners and Zidell Explorations, Inc. (hereinafter "respondent" or "Zidell"). Petitioners contend that the contract was procured by economic coercion and that enforcement of the "red letter" clause is barred by this court's holding in the *Bisso* trilogy.[1]

Magistrate Edward A. Leavy for the United States District Court for the District of Oregon declined to extend *Bisso* and its progeny, all of which involve

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[1] *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 11 (1955) (hereinafter "*Bisso*"); *Boston Metals Company v. S/S Winding Gulf*, 349 U.S. 122, 75 S. Ct. 649, 99 L.Ed. 933 (1955); *Dixilyn Drilling Corp. v. Crescent Towing and S. Co.*, 372 U.S. 697, 83 S. Ct. 967, 10 L.Ed. 2d 78 (1963).

towage contracts, to a shipyard repair contract (Pet. 22a). The District Court held that the exculpatory clause was not void as against public policy absent a showing of overreaching or unequal bargaining power (Pet. 22a). The District Court concluded that petitioners were not overreached, were not in an inferior bargaining position and that there was no evidence that Zidell commands a monopoly in the ship repair business or that petitioners could not have taken their repair work elsewhere (Pet. 22a).

The Ninth Circuit Court of Appeals affirmed. The court relied upon *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F.2d 531 (9th Cir. 1941), *cert. denied* 314 U.S. 690 (1941), which holds that "red letter" clauses in *ship repair* contracts are enforceable and *not* against public policy. *Hall-Scott, supra*, 122 F.2d at 537. The Ninth Circuit reaffirmed its

holding in *Hall-Scott, supra*, and ruled that, absent overreaching, "red letter" clauses in ship repair contracts will be enforced (Pet. 11a). The Court affirmed the District Court's finding that petitioners had *not* been overreached (Pet. 10a).

Petitioners purchased an old river push boat and delivered it to Zidell in October of 1978 for conversion into a freezer-processor vessel (CR 17; PTO 2; RT 171, 226). Petitioners were soon obligated to Zidell for $195,484 for work performed (CR 17; PTO 3; RT 336, 368). The parties entered into a formal, written contract to continue the conversion work on January 24, 1979 (Exs. 3, 4). The first paragraph recited the following "red letter" or "exculpatory" clause:

> "*UNDERSTOOD AND AGREED*:
>
> "1. Pending delivery of the Vessel by Second Party [Zidell] to First Party [petitioners], all risk of loss

> of or damage to the Vessel shall be upon first Party [petitioners], and all and any insurance affording coverage for perils to which the same may be exposed pending such delivery, procured or provided by First Party [petitioners], shall inure to the benefit of First Party [petitioners]. Second Party [Zidell] shall not, under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by First Party [petitioners] by reason of the loss of, damage to, or delays in delivery of, said Vessel." (Exs. 3, 4)

Mr. Thomas A. Sherwood, counsel for Zidell and primary draftsman of the contract (Exs. 3, 4; RT 322), testified that the above paragraph was included because the two entities were massing men and equipment on a single job and Zidell did not wish to be liable for any loss under such circumstances (RT 325-326). He placed the item first to assure prominence (RT 326, 331-332). Mr. Albert D. North, plaintiffs' insurance broker (RT 298), testified that such clauses are common in

building and repair contracts (RT 299-300). Zidell invariably agrees to such a clause when it takes vessels to other yards for repairs (RT 327).

Plaintiffs are knowledgeable and experienced businessmen. Each possesses considerable marine and business experience. Mr. Kent, a 58-year-old Seattle businessman, has spent many years in the construction service, including the last twelve years in boat and marine construction (RT 170). Mr. Morton, a 54-year-old Seattle businessman, operates companies in the marine equipment business (RT 187). He owns fifty percent of a corporation which fabricates and builds 32-foot aluminum gill net fishing boats (RT 187-188). He is also sole owner of Morton Marine Equipment which buys and sells tugs, barges and other floating equipment (RT 188). He testified that he buys and sells up to thirty pieces of

equipment a year in this company (RT 227). Morton Marine Equipment owns more than an acre of dry land and an acre of underwater land and maintains two good-sized buildings on the premises (RT 188). Mr. Morton has been in this business for two decades (RT 189).

Petitioners read and voluntarily signed the contract (RT 203, 205, 226-228, 277-278, 287, 339, 341, 351). They took a copy with them when they left the Zidell offices (RT 354). Mr. Morton declined to have an attorney review the document (RT 216), but conceded that he had ample opportunity to do so (RT 240). He understood the exculpatory language when it was read to him at trial (RT 226). Mr. Kent admitted that the terms were acceptable to him (RT 287). Neither man objected to the agreement or expressed any reservation (RT 339, 341). According to Mr. Paul W. Osmond, Jr., Zidell credit

manager (RT 335), petitioners spent the better part of an hour reviewing the contract (RT 351). Petitioners effected a policy of builder's risk insurance effective on January 25, 1979 -- the day following the signing of the contract with Zidell (RT 234, 301, 239).

The January 24, 1979 contract provided, *inter alia*, that the sum of $200,000 was to be due upon execution of the contract (Exs. 3, 4). Zidell ceased repair work until petitioners paid the agreed-upon sum of $200,000 (RT 200, 271, 293, 342). Petitioners received interim financing in early March, 1979 (Ex. 7, RT 208). Mr. Morton conceded that Zidell was not obligated to proceed under the contract until the above amount was paid (RT 230-231). The sum of $200,000 was paid in March (RT 228, 230), at which time work resumed (RT 280, 288). Petitioners acknowledged that after the March payment,

nothing prevented them from removing the vessel from Zidell's shipyard and employing another ship repair facility (RT 223-224). The vessel was rebuilt and put into service after the fire by a competitor of Zidell, Floating Marine Ways (RT 220, 222-223).

Petitioners worked closely with Zidell in the conversion (RT 173); Mr. Kent and petitioners' crew were present aboard ship almost daily, working concurrently with respondent's employees (RT 171-173; 270). Mr. Emil Mix, Zidell's estimator/coordinator, worked daily with Mr. Kent to decide how to dismantle and convert the vessel (RT 318). Mr. Mix testified that Mr. Kent was aboard "at all times" (RT 318). Petitioners determined what needed to be done as the work progressed and Mr. Mix reduced their directions to pencil and paper sketches (RT 319, 195, 196, 173). Petitioners agreed that they made constant changes (RT 222). On the date of the

fire -- May 2, 1979 (CR 17; PTO 4) -- Mr. Morton and Mr. Kent were present during the day (RT 174). They and their crew were finishing painting the vessel's pilot house (RT 181-182).

The fire occurred during the night shift of May 2, 1979 (CR 17; PTO 4). Zidell's employees were welding a bulkhead at a location specified by petitioners and at Mr. Kent's orders (RT 308, 310). Mr. Robert Guerra, a Zidell supervisor (RT 305-306), testified that no fire watch was possible because Mr. Kent maintained a locked room adjoining the welding area (RT 307-308, 315-316). No one on the Zidell crew had been given a key to the room (RT 309). Mr. Guerra testified that Mr. Kent kept supplies within the locked room (RT 307-308).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. This Court Has Never Extended the *Bisso* Trilogy Beyond Towage Contracts and Should Not Do So in this Instance Because the *Bisso* Public Policy Concerns Are Absent and the Facts Are Otherwise Dissimilar.

The Ninth Circuit, in *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F.2d 531 (9th Cir.), *cert. denied*, 314 U.S. 690 (1941), held that, absent overreaching, "red letter" clauses in ship repair contracts will be enforced. The court

carefully distinguished ship repair contracts from towing contracts.[2]

In the case at bar, the Ninth Circuit merely affirmed and applied the rule of *Hall-Scott* (Pet. 11a). The court emphasized that it did *not* purport to circumscribe *Bisso*'s continued application to towage cases (Pet. 11a). The court added that *Bisso* did not overrule *Hall-Scott, supra, sub silentio* because *Bisso* has *only* been applied to towage contracts (Pet. 10a).

Bisso reaffirmed a longstanding maritime law: that a "red letter" clause

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[2]The *Hall-Scott, supra,* court discussed, *inter alia, The Steamer Syracuse,* 12 Wall. 167, 79 U.S. 167, 20 L. Ed. 382, and *Compania de Navegacion v. Fireman's Fund Ins. Co.,* 277 U.S. 66, 48 S.Ct. 459, 72 L. Ed. 787 (a clause in a towage contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow, does not release the former from loss or damage by virtue of the negligence of her master or crew) (as cited in *Hall-Scott, supra,* 122 F.2d at 535).

in a *tugboat towing* contract is void as against public policy. *Bisso*, 349 U.S. at 632. The Ninth Circuit is in accord. *D.R. Kincaid, Ltd. v. Trans-Pacific Towing, Inc.*, 367 F.2d 857, 858-859 (9th Cir. 1966).

The stated policy reasons which underlie the rule of *Bisso* are, (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. *Bisso*, 349 U.S. at 633. In addition: "increased maritime traffic makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions." *Bisso*, 349 U.S. at 633. The *Bisso* rule sprang from a judicial hostility toward release-from-negligence contracts, particularly those made by businesses dealing widely with the *public* and

possessing potential *monopolistic* powers. *Bisso*, 349 U.S. at 631. The Supreme Court, however, has *never* extended the holding of *Bisso* to a situation in admiralty other than towage, and petitioners cite no authority to the contrary.[3]

Petitioners acknowledge that "red letter" clauses are upheld by the Supreme Court in pilotage contracts (Pet. 13). In *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 91, 53 S. Ct. 135, 77 L. Ed. 311 (1932), a unanimous Supreme Court *upheld* an exculpatory clause in a maritime pilotage situation. The court was persuaded by the following: (1) the pilot was *not* a common carrier or bailee and its services were

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[3]Petitioners boldly overstate both the *Bisso* opinion and its application in the circuits by contending that *Bisso* is applicable to all *non-pilotage* maritime contracts (Pet. 13). The opinion does not purport to extend beyond towage situations. For a case in which a $1,000 per day limitation was *upheld* in a *towage* contract, *see Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61 (6th Cir. 1982).

less than towage, 287 U.S. at 294; (2) the pilot had no exclusive privilege or monopoly and the shipowners were free to turn down the pilot's proffered services, 287 U.S. at 294; and, (3) the parties dealt at arms length, 287 U.S. at 294.

The case at bar meets each of the above criterion, and more. Zidell provides neither towage, common carrier or other service affected with a public interest. It has no monopoly on the local ship repair business by petitioners' own admission (RT 222-224). The parties combined efforts to perform the work and the jury found *concurrent* negligence (RT 455-456). Zidell did not possess sole and exclusive control of the vessel (RT 171-173, 222, 270, 308, 310, 318). The District Court found that petitioners were not overreached (Pet. 22a).

Compare *Bisso* and its progeny. In each case, towage was the subject of the

contract. In each case, the towing company possessed a monopoly power. In each case, the towing company's sole negligence caused the loss. In each case, the towing company exercised sole and exclusive control over the owner's barge. As the Texas District Court remarked in *Hudson Waterways Corp. v. Coastal Marine Serv., Inc.*, 436 F. Supp. 597, 605 (E.D. Tex. 1977), "Towage cases stand in a unique position in the law of admiralty." The instant case does not fall within that unique category.

Magistrate Leavy concluded that petitioners presented *no evidence* that the policy considerations of *Bisso* are or should be applicable to shipyards (Pet. 21a). Nevertheless, petitioners contend that the Ninth Circuit "ignored" the negligence deterrence rationale of *Bisso* and "runs afoul" of *Bisso*'s overreaching rationale (Pet. 11).

As noted by the District Court, *Bisso*'s negligence deterrence rationale has no bearing on a ship repair situation. Petitioners, however, censure the Ninth Circuit decision as "an indictment of Zidell's conduct and a vindication of *Bisso's* negligence deterrence policy" (Pet. 16).

Even if *Bisso's* negligence deterrence reasoning were applicable, petitioners' indictment rings hollow. First, the jury found *concurrent* negligence on the part of each party (RT 455). Petitioners maintained a locked supply room adjacent to the welding site in which flammable materials were stored (RT 307-309, 315-316, 260). Second, the parties worked closely together on the conversion; petitioners maintained daily contact, gave advice and instructions on the conversion and employed their own crew on the project (RT 171-173, 270, 318). The welding which allegedly

caused the fire was done at the direction of Mr. Kent (RT 308, 310). In fact, the clause at issue was incorporated in the contract because the two entities were massing men and equipment on a single job site (RT 325-326). Assuming, *arguendo*, that public policy might resist an exculpatory clause which allocated the loss attributable to a person's *sole negligence* to another (as in *Bisso*), such a rule should not be applied in the present context where both parties control the worksite and combine to cause the harm.

In addition, businessmen recognize that risks are inevitable and seek to apportion risk and insure against costly and lengthy lawsuits by entering into contracts which allocate loss and by the judicious use of insurance to diffuse the risk. "Systematic negligence" would defeat these ends. Intentional conduct or willful action frequently voids insurance coverage

and the loss of a vessel increases the loss of time and money to *both parties* -- the very risk sought to be minimized by the clause.

Petitioners also contend that the Ninth Circuit "runs afoul" of *Bisso*'s overreaching rationale (Pet. 11). However, this change is as untrue as it is vague.

First, *Bisso* cited "potential monopolistic powers" as weighing against enforcement of a "red letter" clause. *Bisso*, 349 U.S. at 631. Petitioners contend that Zidell owned a functional monopoly *vis-a-vis* petitioners and that petitioners could only submit to the contract (Pet. 22). However, petitioners *admit* that after paying their bill in March, nothing prevented them from removing their vessel and employing another shipyard (RT 223-224). Between March and May of 1979, petitioners were free to take the vessel elsewhere. Instead, fully aware of

the contract and exculpatory clause (Exs. 3, 4, 8; RT 212, 220-221, 225, 280, 291, 344), petitioners chose to continue the contractual relationship into which they voluntarily and freely entered (e.g., RT 203, 205, 226-228, 277-278, 287, 339, 341, 351). Petitioners contend that had they removed the vessel, they would have been subject to a suit for breach of contract (Pet. 24). The possibility of such a lawsuit has never been forwarded by Zidell nor evidenced in the record. Petitioners cannot now rely on such unproven (and false) post-fact speculation.

Petitioners' overreaching charge must fail for a second reason. Petitioners fail to realize that a "red letter" clause in a ship repair contract, as in *any* admiralty contract, is unenforceable *whenever* overreaching is proven. *Hall-Scott, supra*. Therefore, the decision below runs afoul of both *Hall-Scott, supra* and *Bisso*'s

overreaching rationale, if and only if overreaching is evident. The record, however, demonstrates that the contract was freely entered into by two experienced marine business concerns (*see* Respondent's Statement of the Case, *supra*). The District Court concluded that petitioners were not the victims of overreaching (Pet. 22a). The Ninth Circuit observed that the trial court's finding with regard to overreaching could not be disturbed unless clearly erroneous[4] (Pet. 10a) and affirmed the District Court's finding (Pet. 11a). In effect, Messrs. Morton and Kent base their petition on the hope that the Supreme Court will overturn a trial court finding of fact. This, of course, is not grounds for granting the petition (*see* Rules of the Supreme Court, Rule 17).

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[4]*See Anaconda Building Materials Co. v. Newland*, 336 F.2d 625, 628 (9th Cir. 1964).

2. The Ninth Circuit's Decision Below Is Not in Conflict with the Decisions of Other Courts of Appeal.

Petitioners contend that the Ninth Circuit's holding conflicts with First Circuit authority applying *Bisso* to ship storage contracts (Pet. 25). These cases are inapposite for two reasons.

First, the First Circuit has applied *Bisso* only to *ship storage* contracts, not to ship repair contracts. Second, the First Circuit cases are self-limiting. In *Fireman's Fund Am. Ins. Co. v. Boston Harbor Marina*, 406 F.2d 917 (1st Cir. 1969), the First Circuit discussed, *sua sponte*, the *possible* relevance of *Bisso* to a ship storage contract in light of *Bisso*'s stated applicability to bailment situations, *Bisso*, 349 U.S. at 632, and the *possibility* that a monopoly and adhesion contract were present. *Boston Harbor Marina, supra*, 406 F.2d at 920, 921.

However, the First Circuit *remanded* the case for further proceedings in light of *Bisso* and made no final pronouncement as to *Bisso*'s applicability. *Boston Harbor Marina, supra*, 406 F.2d at 921. The case was never retried.

Petitioners also seek solace in *Fireman's Fund American Ins. Co. v. Capt. Fowler's Marina, Inc.*, 343 F. Supp. 347 (D. Mass. 1971). This case, which was not appealed to the First Circuit, also involved the storage of a yacht. The court found a bailor-bailee relationship and ruled that a "red letter" clause would fail under *either* the Massachusetts Uniform Commercial Code *or* the public policy rationale of *Bisso*. *Capt. Fowler's Marina, supra*, 343 F. Supp. at 349. However, the court did not elaborate upon its summary conclusion that *Bisso* would apply. Therefore, nothing in the opinion bolsters petitioners' position.

The Fifth Circuit decisions cited by petitioners are not in conflict with *Bisso*, *Hall-Scott*, or the above First Circuit decisions. The Fifth Circuit, in *Alcoa Steamship Company v. Charles Ferran & Company*, 383 F.2d 486 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968), and *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982), has enforced provisions which limit a shipyard's liability to $300,000 under a ship-repair contract. These cases are consistent with the Ninth Circuit, at least where liability is limited by contract to $300,000. Petitioners cannot, and do not, contend that a different holding would result if all liability were limited as in the instant case.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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